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Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1994

BP PERFORMANCE POLYMERS, INC.,

Petitioner,

v.

ETHYL CORPORATION; TRAVELERS INSURANCE COMPANY; LUDGATE INSURANCE CO., LTD.; COMPAGNIE EUROPEENE d'ASSURANCES INDUSTRIELLES S.A.; ASSICURIAZIONI GENERALI, S.P.A.; UTICA MUTUAL INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In departing from decisions of other federal courts of appeals, did the Eighth Circuit err in not remanding this case for a new trial after deciding as a matter of law that this case was improperly tried before, submitted to, and decided by the jury under the incorrect law on liability and damages?

2. Did the Eighth Circuit violate the defendant's Due-Process and Seventh-Amendment rights when it re-examined and rejected the jury's specific, material fact findings, reversed the judgment for the defendant, and then ordered entry of judgment for the plaintiff?

LIST OF PARTIES

Petitioner BP Performance Polymers, Inc. ("BP") has no subsidiary. BP America Inc. is the direct parent corporation and sole owner of BP. BP America Holdings Limited is the indirect parent corporation of BP and sole owner of BP America Inc. BP International Limited is the indirect British parent corporation of BP and sole owner of BP America Holdings Limited. The British Petroleum Company p.l.c. is the indirect British parent corporation of BP and sole owner of BP International Limited. Continental Insurance Company is the direct insurer of BP.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, BP Performance Polymers, Inc. ("BP"), respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit ordering judgment entered for the Respondents,

Ethyl Corporation and its insurers (collectively, "Ethyl"), appellants below, is reported as *Ethyl Corp. v. BP Performance Polymers, Inc.*, 33 F.3d 23 (8th Cir. 1994). This opinion is reprinted in the appendix to this petition. (App. 1-7.) The appeal of Ethyl was from judgment entered 24 May 1993 for BP following a trial by jury. (App. 9.) The district court issued no opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on 22 August 1994. The Court of Appeals for the Eighth Circuit denied BP's timely petition for rehearing *en banc* on 29 September 1994. (App. 8.) The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Seventh Amendment: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

United States Constitution, Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . "

STATEMENT OF THE CASE

At various times from 1985 through 1987, Ethyl purchased a polyethylene chemical compound (or "anti-fog" concentrate) from BP. Ethyl used this anti-fog concentrate as an additive in a clear plastic film wrap that it sold to General Mills, Inc. for use in packaging "Fruit Roll-ups," a snack-food product of General Mills. Ethyl sold its film wrap to General Mills with written certifications guaranteeing that its product was "food-grade" quality and in compliance with the federal Food, Drug, and Cosmetic Act of 1938 and that it would not impart any off taste or odor. Despite making this guarantee, Ethyl neither informed BP of the actual end use of its product, nor independently evaluated its film wrap for FDA compliance, nor obtained any guarantee from BP that its chemical-compounding process was food-grade quality, nor tested its film wrap for off taste or odor. Ethyl's conduct in this regard was contrary to its own internal policies, industry practice, and FDA regulations.

In April 1987, General Mills received customer complaints that some of its Fruit Roll-ups had an off taste. Following investigation, General Mills and Ethyl determined that some of the plastic wrap that Ethyl had sold to General Mills was not food-grade quality. After a nationwide recall of Fruit Roll-ups, General Mills sued Ethyl for Ethyl's failure to provide a food-safe product. Ethyl and its insurers eventually settled the lawsuit by paying General Mills $8,960,000.

Over a year after settlement, Ethyl brought this lawsuit against BP in Iowa state court and BP subsequently removed to federal district court on the basis of diversity of citizenship. Ethyl sought what amounted to reimbursement for its settlement with General Mills. Ethyl's complaint included a variety of claims, but following BP's summary-judgment motion, Ethyl's negligence and strict-liability claims were dismissed and Ethyl proceeded to trial only on breach-of-warranty claims. Before trial, the parties briefed and argued the question of whether the Iowa Comparative Fault Act, Iowa Code §§ 668.1-.15 (1993) ("the Iowa Act"), should apply to Ethyl's breach-of-warranty claims. BP argued that the Iowa Act applied to Ethyl's claims. BP also suggested, in the alternative, that the district court should certify this question to the Iowa Supreme Court to provide certainty on this critical issue. Ethyl opposed the motion, *including* BP's request for certification of the question to the state court. The district court eventually declined to certify the question and ruled on its own that, according to plain statutory language, the Iowa Act applied to Ethyl's claims.

Following this ruling, BP prepared for trial, submitted pre-trial motions and exhibits, entered into certain stipulations of fact, prepared its witnesses, and prepared proposed jury instructions and a verdict form – all with the understanding that Ethyl's claims would be tried under the Iowa Act. Throughout the trial, BP presented substantial evidence to the jury that Ethyl's conduct was the cause of General Mills' damages. This included evidence: (1) that Ethyl had failed to test BP's anti-fog concentrate or its own film wrap for any off taste before selling the product to General Mills and (2) that Ethyl had

failed to follow FDA regulations, its own policy, and industry custom and practice when it gave repeated written assurances to General Mills about the FDA status and the food-grade quality of its film wrap without obtaining prior identical assurances from its suppliers, like BP. (*See* App. 12-13 (Instruction No. 21).)

At the close of trial, the district court gave several substantive instructions to the jury on the issues of damages, proximate cause, and comparative fault. These included an instruction, *mandated by the Iowa Act*, that if the jury found Ethyl's fault to be more than fifty percent of the cause of Ethyl's damages, Ethyl would recover nothing from BP. (App. 11.) After instruction and closing arguments, the case was submitted to the jury with written copies of the court's instructions and a comparative-fault verdict form. (App. 10-13 (selected instructions) & App. 14-16 (verdict form).)

The jury returned the six-question verdict form with specific factual findings. The first two questions and answers established that BP breached an express warranty to Ethyl. The remaining questions revealed the following factual findings in this order:

> [Question 3:] Was [BP's] breach *a* proximate cause of damage to [Ethyl]?
>
> Yes [X] No [ ]
>
> [Question 4:] *Making no reduction for fault, if any, you may attribute to plaintiff Ethyl*, what are plaintiffs' total damages?
>
> [Answer:] $9,367,000

> [Question 5:] What are Ethyl's damages for lost profits included in your answer to Question #4 above?
>
> [Answer:] $ 0
>
> [Question 6:] Taking the total fault of defendant BP and plaintiff Ethyl to equal 100%, what percentage of the total fault do you attribute to defendant BP and plaintiff Ethyl?
>
> | | |
> |---|---|
> | Defendant BP | 30% |
> | *Plaintiff Ethyl* | *70%* |
> | Total: | 100% |

(App. 15-16 (emphasis added).) In sum, the jury found: (1) that BP's breach of an express warranty was *a* cause – not *the* cause – of damages to Ethyl; (2) that Ethyl was seventy percent (and BP only thirty percent) at fault for the damages Ethyl claimed; and (3) that Ethyl's damages were $9,367,000 *without* reduction for fault attributable to Ethyl.[1]

Because the jury found Ethyl more than fifty percent at fault, the district court – on the ground that the Iowa Act prevented any recovery – awarded judgment to BP. Ethyl filed post-trial motions alternatively seeking (1) judgment as a matter of law in the amount of $9,367,000; (2) judgment as a matter of law for thirty percent of that amount, proportionate to the jury's finding of fault; or (3) a new trial. These motions were denied, and Ethyl and its insurers appealed from the judgment in BP's favor.

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[1] The figure of $9,367,000 merely represented the stipulated amount that Ethyl had paid to General Mills ($8,960,000) plus other stipulated expenses of Ethyl (approximately $400,000).

Ethyl made its own (belated) motion on appeal that the question of the applicability of the Iowa Act be certified to the Iowa Supreme Court, but this motion was denied. On the merits on appeal, Ethyl argued, among other things, that the Iowa Act did not apply to its claims and that judgment should be entered in its favor or, in the alternative, a new trial ordered. BP responded arguing that the district court had properly instructed the jury under the Iowa Act and that a fair reading of the verdict form – which showed that Ethyl was seventy percent at fault – indicated that Ethyl, not BP, had proximately caused Ethyl's damages. BP specifically argued that if the appellate court disagreed with its arguments to affirm, the only remedy was a new trial with new instructions to the jury.

The Eighth Circuit ruled in Ethyl's favor on the applicability of the Iowa Act. Although it recognized the unsettled nature of the question under Iowa law, the court of appeals predicted that, because Ethyl's breach-of-warranty claims involved no physical harm to persons or property, the Iowa Supreme Court would *not* have applied the Iowa Act to Ethyl's claims. (App. 6.) Instead of remanding for a new trial, however – complete with proper instructions to the jury on the law – the Eighth Circuit ignored the jury's finding of Ethyl's overriding fault and simply remanded the case "to the district court with directions to enter judgment of $9,367,000 in Ethyl's favor." (App. 6-7.) (*See* Question 4 above.)

The Eighth Circuit premised its decision to remand without a new trial – and thus without regard to the

jury's finding that Ethyl was the predominate cause at fault – on at least one substantial, erroneous factual conclusion. The Eighth Circuit stated that "the jury . . . found BP materially breached the express warranty *and proximately caused* Ethyl to incur $9,367,000 in damages." (App. 3.) This statement is not correct, nor is it supported by the jury findings on the verdict form. BP may have sold anti-fog concentrate that did not conform to Ethyl's undisclosed end use, but the jury did not – as the appellate court incorrectly assumed – find that BP proximately caused all of the damages that Ethyl and its insurers had paid to General Mills.

BP timely petitioned the Eighth Circuit for rehearing to correct the appellate panel's error in the disposition of the case. BP explained to the Eighth Circuit that the panel's disposition not only worked a substantial injustice on BP but that it was directly contrary to recent decisions of other courts of appeals and in violation of the Seventh Amendment. BP requested that the Eighth Circuit remand this case to the district court for a new trial, with a jury properly instructed on the law. The Eighth Circuit denied BP's petition for rehearing without explanation. (App. 8.)

REASONS FOR GRANTING THE PETITION

The decision of the Eighth Circuit directly conflicts with recent decisions of the Tenth Circuit, including *Jackson State Bank v. King*, 992 F.2d 256 (10th Cir. 1993), and *Zierke v. Agri-Systems*, 992 F.2d 276 (10th Cir. 1993), and with decisions in other federal courts of appeals. Indeed,

the Tenth Circuit would characterize what the Eighth Circuit did as "manifestly unjust." The proper appellate disposition of a case in which the jury has been incorrectly instructed on comparative-fault principles is a subject of great importance to courts and litigants and – as this case shows – of substantial consequence to the parties affected by the appellate court's disposition.

The Eighth Circuit's disposition of this case also raises questions of fundamental constitutional importance that this Court should resolve – namely, whether the disposition of this case by the Eighth Circuit has violated the Seventh Amendment and the Due Process Clause. The Seventh Amendment expressly prohibits any fact tried by a jury from being re-examined on appeal. By ordering judgment for Ethyl, the appellate panel effectively re-examined and rejected the jury's finding of fact in Question 6 that Ethyl was largely responsible for (or the proximate cause of) its own damages. The appellate panel also effectively reinterpreted the language of Question 4 as contrary to its plain meaning. Proper deference to BP's Fifth and Seventh-Amendment rights precludes entry of a judgment that disregards or re-evaluates any material jury finding. *See Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962).

The decision of the Eighth Circuit also departs far from the usual and accepted course for disposing of cases on appeal when a jury has been incorrectly instructed on the law relating to liability and damages. After determining that the Iowa Act did not apply to Ethyl's claims, the Eighth Circuit should have remanded this case for a new trial so that the jury – not the appellate court – could determine the proper amount of damages, if any, that

should be awarded to Ethyl. The result in this case, awarding judgment to Ethyl based on a misreading of the jury's verdict form, requires an exercise of this Court's power of supervision.

I. The Eighth Circuit's Disposition of this Case Creates an Irreconcilable Conflict with Decisions in the Tenth Circuit and other Circuits.

In *Jackson State Bank*, the Tenth Circuit faced the very same issue as the Eighth Circuit did in this case but reached a contrary conclusion on the proper disposition of the case. In *Jackson State Bank*, a diversity case, the plaintiff brought a legal-malpractice claim alleging breach of fiduciary duty, breach of contract, and negligence. The jury assessed fault at thirty-five percent for the plaintiff, thirty-five percent for the defendant, and thirty percent to a third party. 992 F.2d at 256. The district court entered judgment for the defendant on the ground that the Wyoming comparative-negligence statute barred recovery. *Id.*

On appeal, the Tenth Circuit presented the issue of the applicability of the comparative-negligence statute to the Wyoming Supreme Court in the form of a certified question. The state supreme court answered that because the plaintiff's claims were contractual in nature, the application of the comparative-negligence statute in the district court was incorrect. *See Jackson State Bank v. King*, 844 P.2d 1093 (Wyo. 1993). "This pronouncement of law alter[ed] the legal theories applicable to [the plaintiff's] causes of action. [The] case [had been] tried and instructed under the assumption that the comparative negligence statute applied." *Jackson State Bank*, 992 F.2d at

257. The plaintiff (like Ethyl), nevertheless, asked the Tenth Circuit simply to remand the case for an immediate award of all claimed damages. The Tenth Circuit declined.

The Tenth Circuit held that a new trial was necessary because the appellate court could "only speculate" about the effect of an instruction correctly stating the law on the answers to the verdict interrogatories. *Id.* Quoting from an earlier decision that held the same under similar circumstances, the Tenth Circuit explained:

> "Here, . . . 'it is clear that the jury was not, as it should have been, fully and correctly instructed on the applicable law of the case.' We hold that in this particular case, *it would be manifestly unjust to assume in any way what the jury would have done had it been correctly instructed and not misled regarding the effect on the judgment of its answers to the special interrogatories.* We therefore decline to adjust the damages for which Defendant is liable in accordance with some speculative theory of apportionment on the various causes of action, and remand this case for a new trial."

Id. at 257-58 (ellipsis points in original; emphasis added) (quoting *Phillips v. Duro-Last Roofing, Inc.*, 973 F.2d 869, 871 (10th Cir. 1992)).

Another recent decision of the Tenth Circuit with which the Eighth Circuit is now in conflict is *Zierke v. Agri-Systems*, 992 F.2d 276 (10th Cir. 1993). In *Zierke*, the plaintiff brought a strict-liability claim in federal district court against the manufacturer of a floor auger that had

injured his foot. The jury determined the plaintiff's damages were $150,000. In its answers to verdict-form interrogatories, however, the jury apportioned ninety percent of the responsibility for the accident to the plaintiff and ten percent to the manufacturer. *Id.* at 277. The jury made this apportionment after being instructed – under Wyoming's comparative-negligence statute – that if the plaintiff's degree of negligence was equal to or greater than the negligence attributed to the defendant, the plaintiff would not be able to recover from the defendant. *Id.* at 277 n.1. One month later, the Wyoming Supreme Court issued a decision holding that the state comparative-negligence statute did *not* apply to any strict-liability claim. The district court, consequently, entered an amended judgment awarding the full $150,000 to the plaintiff. *Id.* at 277-78.

On appeal, the Tenth Circuit reversed, observing that, by ascribing ninety percent of the fault to the plaintiff, the jury might have found that the plaintiff had assumed the risk of the injury and, therefore, should be barred from recovery. The appellate court further explained that, in any event, the jury had been incorrectly instructed on the law and judgment could not be entered based on the jury's answers on the verdict form. Accordingly, the appellate court "remand[ed] the case for a new trial on the issue of strict liability with jury instructions that state current Wyoming law and interrogatories that specifically inquire as to whether [the plaintiff] assumed the risk." *Id.* at 279.

The conclusion of the Tenth Circuit in *Jackson State Bank* and in *Zierke* – that a new trial is required – is the

same conclusion reached in other circuits when an appellate court determines that a jury has been incorrectly instructed on the law relating to liability and damages.[2] In *Pratico v. Portland Terminal Co.*, 783 F.2d 255, 268 (1st Cir. 1985), for example, an action under the Federal Employers' Liability Act ("FELA"), the jury returned a verdict for the plaintiff in the amount of $227,000 but also found the plaintiff eighty percent contributorily negligent. As a consequence, the district court reduced the plaintiff's award to $45,000. *Id.* at 257. On appeal, the plaintiff argued, as he had in the district court, that because his injury was caused by the defendant railroad's use of equipment in violation of safety regulations under the Occupational Safety and Health Act ("OSHA"), his employer's action constituted negligence per se. *Id.* at 259-62. He also argued that under FELA his employer's defense of contributory negligence was eliminated because the violation of these safety regulations had led to his injury. *Id.* at 262-68. The First Circuit held that the plaintiff was correct as a matter of law, but it refused to enter judgment for the plaintiff in the full amount of $227,000. The First Circuit, instead, decided that "the proper course of action" was to remand the case for a new trial, one in which the jury would be correctly instructed on the law and allowed to determine whether the employer had in fact violated OSHA regulations and

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[2] This conclusion has also been reached by the highest courts of various states, including states within the Eighth Circuit. *See, e.g., Little Rock Electrical Contractors v. Okonite Co.*, 294 Ark. 399, 402-03, 744 S.W.2d 381, 383 (1988) (jury improperly instructed to apply comparative-fault principles in breach-of-warranty case; new trial required).

whether the violation had caused the plaintiff's injury. *Id.* at 268.

Here, by ordering entry of judgment for Ethyl even though the jury had been incorrectly instructed on liability and damages, the Eighth Circuit created an irreconcilable conflict with the Tenth Circuit in *Jackson State Bank* and *Zierke* and the First Circuit in *Pratico*. The "manifestly unjust" result rejected by the Tenth Circuit – summarily ordering judgment for an award of damages to the plaintiff without a new trial – is exactly what the Eighth Circuit has imposed on BP. This conflict among the circuits is not one formed in dicta, nor is it a conflict in mere principle. It is a real conflict – between circuit decisions very close in time (especially *Jackson State Bank* and *Zierke*) – on the proper disposition of cases. There can be no doubt that if the Tenth Circuit or the First Circuit were faced with this case on appeal, the result would have been dramatically different: the appellate court would have been compelled to remand for a new trial.

Furthermore, unlike some cases that present this Court with a conflict between federal courts of appeals, the issue here is not one on which this Court should postpone consideration for the purpose of allowing further study of the subject in the lower courts. In fact, the opposite is true. Fact finding is a function of the jury, not a court of appeals, and this Court should act now to prevent further erosion of any civil litigant's Seventh-Amendment rights and to prevent further confusion among the circuits about the permissible review of a jury's factual determinations. Sound principles of judicial administration favor swift and efficient disposition of cases, but not without regard to the sanctity of the jury's

fact-finding function or at the expense of substantial justice to the litigants.

This is also not a matter of construing an ambiguous verdict to do substantial justice. The jury's answers in this case were consistent and proper under the comparative-fault principles applied. Once it was determined on appeal that comparative fault should not apply, however, the court of appeals re-interpreted the verdict form in a manner inconsistent with the jury's findings of fact. Thus, the Eighth Circuit's disposition of this case was "manifestly unjust."

II. The Eighth Circuit's Disposition of this Case Raises Questions of Fundamental Constitutional Importance Relating to Due Process and the Express Requirement of the Seventh Amendment that No Fact Tried by a Jury Shall Be Re-Examined in any Court.

The irreconcilable conflict between federal courts of appeals is not the only reason why this Court should grant BP's petition for writ of certiorari. This Court should also review this case because the Eighth Circuit's disposition on appeal raises important questions of constitutional law – namely, whether the Eighth Circuit violated BP's rights under the Fifth and Seventh Amendments by remanding without a new trial.

The Seventh Amendment to the United States Constitution preserves the right to trial by jury in its first clause and, in its second clause, assures that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common

law." U.S. Const. amend. VII. Justice Story explained more than 150 years ago that this second clause of the Seventh Amendment is "a substantial and independent clause" and "more important" than the first clause. *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 446 (1830). The second clause of the amendment strictly limits the power of courts in relation to fact-finding:

> [It] is a prohibition to the courts of the United States to re-examine any facts, tried by a jury, in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings.

Id. The importance of the Seventh Amendment's prohibition is reflected in other pronouncements of this Court, and in situations analogous to this case. *See, e.g., Dimick v. Schiedt*, 293 U.S. 474, 486-87 (1935) (practice of additur – which would allow a trial court to increase the amount of a verdict when a jury has acted improperly, provided the defendant consented – is unconstitutional; new trial required).

As part of their fact-finding function, federal juries regularly assign fault, determine liability and causation, and assess the amount of damages in a wide variety of civil cases. Under the Seventh Amendment, a jury's determination of these facts is inviolate. *See* Fed. R. Civ. P. 38(a). No federal court has authority to re-examine these facts tried by a jury or, in general, to modify the verdict

of a jury that has passed on these issues of fact. These are well-established principles of law.

In *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962), for example, the Third Circuit ignored a jury's special interrogatory answer absolving a third-party defendant from liability and summarily imposed liability "as a matter of law." *Id.* at 358. This Court reversed, finding that the court of appeals had overstepped its authority by essentially retrying the case on appeal: "[N]either we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them." *Id.* at 358-59. *See also, e.g., Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 498 (1931) (ordering new trial and explaining that it is "of vital significance" that "issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury").

Here, the jury made critical findings of fact relevant to this petition – which were re-examined and rejected on appeal. First, the jury found that Ethyl's total damages *without any deduction for Ethyl's fault* were $9,367,000, and it entered this amount as its answer to Question 4 on the verdict form. This answer merely reflected the settlement amount that Ethyl and its insurers had paid to General Mills ($8,960,000) plus other stipulated legal and investigation expenses incurred in the underlying action with General Mills (approximately $400,000). Second, the jury found that *Ethyl's own acts and omissions* were the predominate cause of these damages. This was reflected in

the jury's finding in Question 6 that Ethyl was responsible for *seventy percent* of the total fault attributable to both Ethyl and BP.

After predicting that the Iowa Supreme Court would not have applied the Iowa Act to Ethyl's breach-of-warranty claims, the Eighth Circuit summarily ordered judgment entered for Ethyl in the amount inserted by the jury in response to Question 4. This decision thus re-examined (or ignored) the jury's other factual findings, including the findings in Questions 3 and 6 that Ethyl's acts and omissions were the *primary* cause of its own damages. This is a gross misuse of an appellate court's power of review. The Eighth Circuit's disposition in no way represents a reasonable or consistent inference that might be drawn from the jury's answers on the verdict form. After predicting that the Iowa Supreme Court would not have applied the Iowa Act to Ethyl's claims, the Eighth Circuit should have remanded this case to the district court for a new trial rather than try to glean from the trial court record and verdict form its own factual finding on Ethyl's damages.

Finally, for much the same reasons, the Eighth Circuit's disposition of this case violates the Due Process Clause. It is axiomatic that the government may not deprive a person of property without certain procedural safeguards. Indeed, the fundamental requirement of Due Process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). BP received no meaningful review of the facts under the appropriate law, and the Eighth Circuit's ruling, long after the district court had held that the Iowa Act applied, falls far short of a hearing

"at a meaningful time."[3] By reversing the district court and ordering judgment entered for Ethyl without any trial involving the necessary findings of fact by a jury, BP's rights under the Due Process Clause were violated.

III. The Eighth Circuit's Departure from the Accepted and Usual Course of Disposing of Cases Like This on Appeal Requires an Exercise of this Court's Power of Supervision.

This Court has, on prior occasions, granted review on petitions for writ of certiorari when a jury has been given erroneous instructions. Indeed, this Court has required remand for a new trial when the general effect of an erroneous instruction on the jury's decision is unknowable on appeal. *See, e.g., Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 312 (1986) ("The effect of the erroneous instruction [on damages] is therefore unknowable, although probably significant. . . . "; remanded for a new trial). Further, this Court has held that "in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury." *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919) (erroneous and misleading instruction on contributory negligence; remanded for new trial). Unless it appears that the erroneous instructions were "affirmatively harmless," the

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[3] The injustice resulting from the Eighth Circuit's Due-Process violation was exacerbated by the award on appeal of prejudgment interest *against BP*. As a result, because of the passage of time, the actual judgment against BP has grown to over $13 million.

erroneous instructions furnish grounds for a new trial. *Id.* *See also United States v. River Rouge Improvement Co.*, 269 U.S. 411, 421 (1926) ("an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties, – especially when embodied in the charge to a jury, – is to be held a ground for reversal"). Because the Eighth Circuit has departed so far from these principles and "the accepted and usual course of judicial proceedings" by not granting a new trial, this Court should grant this petition and exercise its power of supervision. *See* Sup. Ct. R. 10.1(a).

The district court's ruling that the Iowa Act applied to Ethyl's claims and its concomitant instruction to the jury was not an "affirmatively harmless" error. Until the Eighth Circuit predicted on appeal that the Iowa Supreme Court would have held the Iowa Act inapplicable, the parties were bound to present the case on the law as ordered by the district court. If the district court had ruled before trial that the Iowa Act did not apply, counsel for BP would have tailored its overall defense with a very different analysis on both liability and damages in mind.[4] Moreover, the closing arguments, jury instructions, and

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[4] This is exactly the legal guidance that *BP* sought when it asked the district court prior to trial to certify the question of the application of the Iowa Act to the state supreme court. Ethyl opposed that motion and the district court declined to certify. It was only after Ethyl lost its case with the jury that Ethyl belatedly made its own request for certification on appeal from its adverse judgment.

verdict form would undoubtedly have been different, both in substance and emphasis.

For example, if comparative fault had been ruled inapplicable *prior* to trial, the case would have been tried, instructed, and decided under the principles of Iowa's commercial code. Accordingly, the jury would have been instructed that any consequential damages must be shown to have been *the* result of the defendant seller's alleged breach of warranty. Under the Iowa code, a plaintiff's consequential damages would *not* include any damages of which the defendant seller had no reason to know and which the plaintiff could not have otherwise reasonably prevented. Iowa Code Ann. § 554.2715(2) (West 1967) (App. 22-23.) In this case, therefore, rather than speaking in terms of apportioned fault, the district court would have instructed the jury to determine the extent to which factors *other* than BP's breach – especially Ethyl's own culpable acts or omissions, both before and after it realized a breach – proximately caused the consequential damages claimed (i.e., Ethyl's settlement payment to General Mills).

In sum, it is impossible to say – as the Eighth Circuit essentially did in disposing of this case on appeal – that if the jury had been properly instructed on the law and had been given a verdict form that accurately reflected the law, the jury would still have come to the conclusion that judgment should go to plaintiff in the amount of $9,367,000. The Tenth Circuit found such a conclusion impossible in *Jackson State Bank* and *Zierke*, and the Eighth Circuit should have found it impossible in this case. By curtly disposing of this case, with directions to the district court "to enter judgment of $9,367,000 in Ethyl's

favor," the Eighth Circuit has brought about a substantial injustice to BP and to the uniformity of appellate review under the Seventh Amendment. This error requires an exercise of this Court's supervisory power to correct.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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22 December 1994

United States Court of Appeals

For the Eighth Circuit

No. 93-3124NI

Ethyl Corporation; Travelers Insurance Company; Ludgate Insurance Co., Ltd.; Compagnie Europeene d'Assurances Industrielles S.A.; Assicuriazioni Generali S.P.A.; Utica Mutual Insurance Company,	*	Appeal from the United States District Court for the Northern District of Iowa.
Appellants,	*	
v.	*	
BP Performance Polymers, Inc.,	*	
Appellee.	*	

Submitted: April 14, 1994

Filed: August 22, 1994

Before McMILLIAN, Circuit Judge, OAKES,* Senior Circuit Judge, and FAGG, Circuit Judge.

FAGG, Circuit Judge.

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* The HONORABLE JAMES L. OAKES, United States Senior Circuit Judge for the Court of Appeals for the Second Circuit, sitting by designation.

The question before us in this diversity case is whether the Iowa Comparative Fault Act (the Iowa Act), Iowa Code §§ 668.1-.15 (1993), applies to Ethyl Corporation's breach of warranty claim seeking recovery of entirely economic losses against BP Performance Polymers, Inc. (BP). Because the Iowa Supreme Court has not decided whether the Iowa Act applies to this type of claim, *see Garren v. First Realty, Ltd.*, 481 N.W.2d 335, 338 (Iowa 1992), we must predict how that court would decide the question. *Brandenburg v. Allstate Ins. Co.*, 23 F.3d 1438, 1440 (8th Cir. 1994). Reviewing the question of state law de novo, *see Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991), we predict the Iowa Supreme Court would not apply the Iowa Act to Ethyl's claim. We thus reverse the district court's contrary decision and remand.

From 1985 through 1987, Ethyl purchased chemical compounds from BP for use in making plastic film wrap. Ethyl in turn sold the wrap to General Mills for use in packaging General Mills's Fruit Roll-ups, a food product. In April 1987, General Mills notified Ethyl it had received complaints that some of its Fruit Roll-ups had a strange taste. Both General Mills and Ethyl investigated the complaints and eventually, in 1989, they determined BP had shipped some contaminated chemical compound to Ethyl and Ethyl had used the contaminated compound in the Fruit Roll-up packaging. After General Mills initiated a nationwide recall of its Fruit Roll-ups, General Mills sued Ethyl for Ethyl's failure to provide a food-safe plastic wrap. The two parties settled the claim, and Ethyl paid $8,960,000 to General Mills under the settlement agreement.

Ethyl then filed this lawsuit against BP, seeking reimbursement from BP for the full amount it paid to General Mills plus damages for loss of revenue, loss of business advantage, costs, and attorney's fees. Initially, Ethyl alleged claims against BP for breach of contract, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, negligence, and strict liability. In response to a summary judgment motion by BP, the district court dismissed Ethyl's negligence and strict liability claims, concluding Ethyl's claims "sound[ed] in economic loss" and thus should be resolved under contract law rather than tort law. The district court also noted Ethyl's contract and express warranty claims were virtually identical. Ethyl proceeded to trial on only express and implied warranty theories. Before trial, the district court decided the Iowa Act applied to Ethyl's breach of warranty claims.

At trial, there was no dispute that BP caused the compound contamination. The parties did dispute whether BP knew the compound would ultimately be used with food products, whether Ethyl should have obtained a guarantee from BP of the chemical ingredients used in the compound, and whether Ethyl should have obtained Food and Drug Administration certification of the chemical compound. After trial, a jury found BP made an express warranty to provide Ethyl with uncontaminated chemical compounds. The jury also found BP materially breached the express warranty and proximately caused Ethyl to incur $9,367,000 in damages. Because the jury found Ethyl 70% at fault, however, the district court awarded no damages to Ethyl. *See* Iowa Code § 668.3(1)

(barring recovery by claimant who bears greater percentage of fault than defendants). Ethyl appeals, arguing the district court should have awarded $9,367,000 in damages because the Iowa Act does not apply to Ethyl's breach of warranty claims.

The district court applied the Iowa Act to Ethyl's breach of warranty claim because the plain language of the Iowa Act's fault definition includes the term "breach of warranty." The Iowa Act defines "fault" as

> [O]ne or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages.

Iowa Code § 668.1(1). Unlike the district court, we do not believe the Iowa Act applies to all breach of warranty claims, regardless of their nature. Viewing the fault definition in context of the Iowa Act's purpose, Iowa case law, and official comments, we believe the Iowa Act applies only when the breach results in personal injury or property damage.

The Iowa Act "relat[es] to liability in tort by establishing comparative fault as the basis for liability in relation to claims for damages arising from injury to or death of a person or harm to property." 1984 Iowa Acts 524; *see Waterloo Sav. Bank v. Austin ex rel. Austin*, 494 N.W.2d 715,

717 (Iowa 1993). Consistent with the Iowa Act's application in the tort context, the Iowa Supreme Court has held the Iowa Act does not apply when the claim for relief is "contractual in nature." *Austin*, 494 N.W.2d at 717; *Vasquez v. LeMars Mut. Ins. Co.*, 477 N.W.2d 404, 409 (Iowa 1991). As the district court recognized in ruling on BP's summary judgment motion, Ethyl's breach of warranty claim is a contractual one. Under Iowa law, a claim for purely economic loss is recoverable only in contract and not in tort law. *Nelson v. Todd's Ltd.*, 426 N.W.2d 120, 123-25 (Iowa 1988) (entirely economic injuries without accompanying physical injury to person or property are not recoverable under strict liability or negligence).

In addition to this guidance found in Iowa law, the Uniform Comparative Fault Act's official comments state the Uniform Act does not cover contract claims seeking entirely economic recovery. The Iowa Act is patterned after the Uniform Comparative Fault Act and the Uniform Act's official comments are persuasive in interpreting the Iowa Act. *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 148 (Iowa 1992). Indeed, the Iowa Act's definition of fault is taken directly from the Uniform Act. *Id.* The Uniform Act's official comments state the Uniform Act only covers physical harm to persons or property and consequential damages deriving from physical harm. Uniform Comparative Fault Act § 1 comment, 12 U.L.A. 44 (Supp. 1994). With regard to breach of warranty claims, the comments specifically state:

> An action for breach of warranty is held to sound sometimes in tort and sometimes in contract. There is no intent to include in the coverage of the Act actions that are fully contractual

> in their gravamen and in which the plaintiff is suing solely because [the plaintiff] did not recover what [the plaintiff] contracted to receive. The restriction of coverage to physical harms to person or property excludes these claims.

Id. at 45. We conclude the Iowa Supreme Court would not apply the Iowa Act to Ethyl's claim because it involves no physical harm to persons or property.

BP argues *Renze Hybrids, Inc. v. Shell Oil Co.*, 418 N.W.2d 634 (Iowa 1988), supports the district court's application of the Iowa Act in this case. We disagree. Although the trial court had applied the Iowa Act to Renze's breach of implied warranty claim, the breach caused damage to Renze's property and Renze did not challenge the Iowa Act's application on appeal. *Id.* at 637, 639; *see Manning v. International Harvester Co.*, 381 N.W.2d 376, 378-79 (Iowa Ct. App. 1985) (when defective planting machine caused corn grower's crop to be smaller than it should have been, harm to grower's crop was physical property damage, not economic loss, and thus grower could recover in tort). Ethyl suffered entirely economic loss, thus, *Renze* does not apply here.

Because the district court committed error in applying the Iowa Act to Ethyl's claim, we need not reach Ethyl's remaining arguments. We reverse the district court's judgment, and we remand this case to the district

court with directions to enter judgment of $9,367,000 in Ethyl's favor.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

For the Eighth Circuit

No. 93-3124NIW

Ethyl Corporation, et al., Appellants, v. BP Performance Polymers, Inc., Appellee.	* * * * * * * * *	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 29, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States District Court
Northern DISTRICT OF Iowa

ETHYL CORPORATION, TRAVELERS INSURANCE CO., UTICA MUTUAL INSURANCE CO., COMPAGNIE EUROPEENE d'ASSURANCES INDUSTRIELLES S.A., LUDGATE INSURANCE CO., LTD., and ASSICURIAZIONI GENERALI, SPA,

Plaintiffs,

vs.

BP PERFORMANCE POLYMERS, INC.

Defendant

JUDGMENT IN A CIVIL CASE

(Filed May 24, 1993)

CASE NUMBER: C90-2064

[X] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff take nothing, that the action is dismissed and that the defendant recover of the plaintiffs its costs of action.

May 24, 1993
Date

/s/ WILLIAM J. KANAK
Clerk

/s/ Cheryll S. Scott
~~*(By) Deputy Clerk*~~
CHERYLL S. SCOTT
Chief Deputy Clerk

051793uN
IC §554.2715
Western Industries, Inc. v. Newcor Canada, Ltd.,
739 F.2d 1198, 1203 (7th Cir. 84)

DAMAGES

Instr. No. 18

If you should find by a preponderance of the evidence that plaintiffs have been damaged, you may award them only such damages as will reasonably compensate and only such damages as you find they sustained as a proximate result of BP's alleged wrongful conduct.

Beyond the purchase price paid by Ethyl for the BP product purchased in 1986, all of plaintiffs' claims are for incidental and consequential damages. Consequential damages are those damages relating to any loss resulting from general or particular requirements or needs of the buyer which the seller had reason to know of at the time of contracting and which could not be reasonably prevented by the buyer. The particular needs of the buyer must be made known to the seller while general needs may be inferred from the circumstances.

Any incidental and consequential damages you award must be foreseeable or have been reasonably foreseen at the time the parties entered into their contract.

051793uN
ICJI 400.1, 400.2, 400.3, 400.4
IC §668.1

COMPARATIVE FAULT – FAULT DEFINED

Instr. No. 20

If you find that plaintiffs have established one or more of the breach of warranty claims and are entitled to damages, you must consider defendant's defense of comparative fault.

"Fault" means one or more acts or omissions which constitute negligence or breach of warranty.

Damages may be the fault of more than one party. In comparing fault, you should consider all of the surrounding circumstances as shown by the evidence, together with the conduct of Ethyl and BP and the extent of the causal relation between their conduct and the damages claimed. You should then determine what percentage, if any, each party's fault contributed to the damages.

After you have compared the conduct of all parties, if you find Ethyl was at fault and that its fault was more than 50% of the total fault, it cannot recover damages. However, if you find Ethyl's fault was 50% or less of the total fault, then its total damages will be reduced by the percentage of its fault.

051793uN
D&B §§ 80.18, 80.19

"PROXIMATE CAUSE" – DEFINED

Instr. No. 23

Damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the damage, and that the damage was either a direct result or a reasonably probable consequence of the act or omission.

This does not mean that the law recognizes only one proximate cause of damage, consisting of only one factor or thing, or the conduct of only one actor. On the contrary, many factors or things, or the conduct of two or more actors, may operate at the same time, either independently or together, to cause damage; and in such a case, each may be a proximate cause.

052093uN
ICJI 400.6
IC §668

COMPARATIVE FAULT – ELEMENTS OF DEFENSE

Instr. No. 21

BP claims Ethyl was at fault in one or more of the following particulars: (1) Ethyl failed to test the BP product or its own film wrap for bad taste prior to selling the

product to General Mills; and (2) Ethyl failed to follow the law and what BP claims was Ethyl's own policy and industry custom and practice to obtain assurances from its suppliers such as BP before giving similar assurances to General Mills about FDA status and direct food application of its film wrap.

In order to establish this defense, BP must prove the following propositions:

1. Ethyl was at fault in one or more of these particulars; and

2. Ethyl's fault was a proximate cause of plaintiffs' damage.

If BP has failed to prove either of these propositions, BP has not proved its defense. If BP has proved both of these propositions, then you will assign a percentage of fault against the plaintiffs on the verdict form.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

ETHYL CORPORATION, TRAVELERS INSURANCE CO., UTICA MUTUAL INSURANCE CO., COMPAGNIE EUROPEENE d'ASSURANCES INDUSTRIELLES S.A., LUDGATE INSURANCE CO., LTD., and ASSICURIAZIONI GENERALI, SPA, Plaintiffs, vs. BP PERFORMANCE POLYMERS, INC. Defendant.	NO. C 90-2064 VERDICT FORM (Filed May 20, 1993)

1. In connection with the sale of its product to plaintiff Ethyl in July of 1986, did defendant BP make an

(a) express warranty	Yes [X]	No [ ]
(b) implied warranty of fitness for a particular purpose	Yes [ ]	No [X]
(c) implied warranty of merchantability	Yes [ ]	No [X]

If your answer to each part of Question #1 is no, answer no further questions. Sign and date the verdict form, and deliver it to the Marshal.

If your answer to any part of Question #1 is yes, answer the applicable corresponding parts of Question #2.

2. Did defendant materially breach its

(a)	express warranty	Yes [X]	No [ ]
(b)	implied warranty of fitness for a particular purpose	Yes [ ]	No [X]
(c)	implied warranty of merchantability	Yes [ ]	No [X]

If your answer to each part of Question #2 is no, answer no further questions. Sign and date the verdict form, and deliver it to the Marshal.

If your answer to any part of Question #2 is yes, answer Question #3.

3. Was defendant's breach a proximate cause of damage to plaintiffs?

Yes [X] No [ ]

If your answer to Question #3 is no, answer no further questions. Sign and date the verdict form, and deliver it to the Marshal.

If your answer to Question #3 is yes, answer Questions #4, #5 and #6.

4. Making no reduction for fault, if any, you may attribute to plaintiff Ethyl, what are plaintiffs' total damages?

$ 9,367,000

5. What are Ethyl's damages for lost profits included in your answer to Question #4 above?

$ 0

6. Taking the total fault of defendant BP and plaintiff Ethyl to equal 100%, what percentage of the total fault do you attribute to defendant BP and plaintiff Ethyl?

Defendant BP	30 %
Plaintiff Ethyl	70 %
Total:	100 %

[Signatures of Jurors]

[Iowa Code § 668.1 (1987):]

668.1 Fault defined

1. As used in this chapter, "fault" means one or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages.

2. The legal requirements of cause in fact and proximate cause apply both to fault as the basis for liability and to contributory fault.

[Iowa Code § 668.3 (1987):]

668.3. Comparative fault – effect – payment method

1. Contributory fault shall not bar recovery in an action by a claimant to recover damages for fault resulting in death or in injury to person or property unless the claimant bears a greater percentage of fault than the combined percentage of fault attributed to the defendants, third-party defendants and persons who have been released pursuant to section 668.7, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the claimant.

2. In the trial of a claim involving the fault of more than one party to the claim, including third-party defendants and persons who have been released pursuant to section 668.7, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:

a. The amount of damages each claimant will be entitled to recover if contributory fault is disregarded.

b. The percentage of the total fault allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under section 668.7. For this purpose the court may determine that two or more persons are to be treated as a single party.

3. In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party and the extent of the causal relation between the conduct and the damages claimed.

4. The court shall determine the amount of damages payable to each claimant by each other party, if any, in accordance with the findings of the court or jury.

5. If the claim is tried to a jury, the court shall give instructions and permit evidence and argument with respect to the effects of the answers to be returned to the interrogatories submitted under this section.

6. In an action brought under this chapter and tried to a jury, the court shall not discharge the jury until the court has determined that the verdict or verdicts are consistent with the total damages and percentages of

fault, and if inconsistencies exist the court shall do all of the following:

a. Inform the jury of the inconsistencies.

b. Order the jury to resume deliberations to correct the inconsistencies.

c. Instruct the jury that it is at liberty to change any portion or portions of the verdicts to correct the inconsistencies.

7. When a final judgment or award is entered, any party may petition the court for a determination of the appropriate payment method of such judgment or award. If so petitioned the court may order that the payment method for all or part of the judgment or award be by structured, periodic, or other nonlump-sum payments. However, the court shall not order a structured, periodic, or other nonlump-sum payment method if it finds that any of the following are true:

a. The payment method would be inequitable.

b. The payment method provides insufficient guarantees of future collectibility of the judgment or award.

c. Payments made under the payment method could be subject to other claims, past or future, against the defendant or the defendant's insurer.

8. In an action brought pursuant to this chapter the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings on each specific item of requested or awarded damages indicating that portion of the judgment or decree awarded for past

damages and that portion of the judgment or decree awarded for future damages.

[Iowa Code § 668.5 (1987):]

668.5. Right of contribution

1. A right of contribution exists between or among two or more persons who are liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligations, including the share of fault of a claimant, as determined in accordance with section 668.3.

2. Contribution is available to a person who enters into a settlement with the claimant only if the liability of the person against whom contribution is sought has been extinguished and only to the extent that the amount paid in settlement was reasonable.

3. Contractual or statutory rights of persons not enumerated in section 668.2 for subrogation for losses recovered in proceedings pursuant to this chapter shall not exceed that portion of the judgment or verdict specifically related to such losses, as shown by the itemization of the judgment or verdict returned under section 668.3, subsection 8, and according to the findings made pursuant to section 668.14, subsection 3, and such contractual or statutory subrogated persons shall be responsible for a

pro rata share of the legal and administrative expenses incurred in obtaining the judgment or verdict.

4. Subrogation payment restrictions imposed pursuant to subsection 3 apply to settlement recoveries, but only to the extent that the settlement was reasonable.

[Iowa Code § 668.6 (1987):]

668.6 Enforcement of contribution

1. If the percentages of fault of each of the parties to a claim for contribution have been established previously by the court as provided in section 668.3, a party paying more than the party's percentage share of damages may recover judgment for contribution upon motion to the court or in a separate action.

2. If the percentages of fault of each of the parties to a claim for contribution have not been established by the court, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is sought.

3. If a judgment has been rendered, an action for contribution must be commenced within one year after the judgment becomes final. If a judgment has not been rendered, a claim for contribution is enforceable only upon satisfaction of one of the following sets of conditions:

a. The person bringing the action for contribution must have discharged the liability of the person from

whom contribution is sought by payment made within the period of the statue of limitations applicable to the claimant's right of action and must have commenced the action for contribution within one year after the date of that payment.

b. The person seeking contribution must have agreed while the action of the claimant was pending to discharge the liability of the person from whom contribution is sought and within one year after the date of the agreement must have discharged that liability and commenced the action for contribution.

[Iowa Code § 554.2715:]

554.2715 Buyer's incidental and consequential damages

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.